UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THOMAS B. ANDERSON,	)	
Plaintiff,	)	
-against-	)	**Civil Action No. 04cv08180 (SAS)**
SOTHEBY'S, INC. SEVERANCE PLAN, et al.,	)	**ELECTRONICALLY FILED**
Defendants.	)	

REPLY MEMORANDUM IN SUPPORT OF
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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Date: March 24, 2006

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Anderson views the evidence one way; the Committee viewed it another. Anderson believes the Committee should have credited his testimony; the Committee instead credited that of Michael Good. When Anderson asserts that "no evidence" supports the Committee's determinations, he is really asking this Court to disregard the Committee's thorough review of the evidence in its denial letters, and to review the evidence *de novo*. Anderson is not entitled to such *de novo* review. The Committee's determination that Anderson is not entitled to severance benefits under the Plan was not arbitrary and capricious. It should be affirmed.

1. The Committee found that Cendant offered Anderson a defined position.

As Sotheby's has discussed, substantial evidence supports the Committee's finding that Cendant offered Anderson a position with defined responsibility and compensation before March 31, 2004. Defs.' Mem. 5-6. Anderson argues that Good could have made Cendant's offer even more precise in the three meetings that he had with Good *after* he had tendered his resignation. Pl.'s Opp. 4 n.2. But the legally relevant facts are that Cendant had already offered Anderson a defined position, and that Anderson had already announced his resignation when these meetings occurred. Defs.' Mem. 5-6. The fact that Good continued to meet with Anderson only underscores the strength of Cendant's interest in meeting Anderson's terms.

2. The Committee found that Cendant offered comparable responsibility.

As Sotheby's has discussed, substantial evidence supports the Committee's finding that Cendant offered Anderson a position with comparable authority and responsibility. Defs.' Mem. 6-10. Anderson has not shown that this comparability finding was arbitrary and capricious.

Anderson generally asserts that the record does not support the Committee's determination. Pl.'s Opp. 6-11. The Committee's initial denial letter, however, provided a detailed explanation of the Committee's comparison of Anderson's job responsibilities at Sotheby's and Cendant. Defs.' Mem. 7. Good and Maria Perez-Brau's explanation of Anderson's position at Cendant largely match Anderson's own description of his prior position at Sotheby's, as well as the description provided by Stuart Siegel, Anderson's superior at Sotheby's. *Id.* at 6-9.[1]

The Committee specifically concluded that until affiliates in Anderson's regions converted to Cendant franchises, Anderson's responsibilities with respect to affiliate management and administration would have been identical to his responsibilities before the Cendant sale. *Id.* at 8-9. In attacking this conclusion, Anderson essentially contends that the Committee should not have credited the statements to this effect made by Good, which the Committee recounted in its initial denial letter. Pl.'s Opp. 9.[2] But it is the Committee's function to decide whose testimony to credit. The Committee's determination to credit Good's testimony instead of Anderson's was not arbitrary and capricious.

Anderson asserts that the Committee failed to take into account that, in his opinion, the Cendant position offered him less prestige and downgraded his professional identity. Pl.'s Opp. 7-9. But the Committee rejected Anderson's position that "a claimant's 'professional identity' must be considered under the Plan." Judish Decl., Ex. A at A0214; *see also Bausch & Lomb Inc.*

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[1] Pointing to the Committee's description of the Cendant position as including "converting existing affiliates to franchises" and "ongoing affiliate management and administration" (Pl.'s Opp. 10-11), Anderson asserts that this description confirms that "there is no evidence that Anderson was required or even asked to engage in realtor services by Cendant" (*id.* at 11). Anderson, however, ignores the Committee's definition of "management and administration," which included "advising on, assisting with, and participating in listing presentations *and providing realtor services*." Judish Decl., Ex. A at A0205 (emphasis added).

[2] Good informed the Committee that between February 17 and March 31, 2004, Anderson did the "same thing" with the "same autonomy and responsibility" as prior to the Cendant sale. Judish Decl., Ex. B at TBA02070-71; *see also id.*, Ex. A at A0163 ("[B]etween February 17, 2004 through . . . March 31, 2004, Mr. Anderson had no franchise-related duties, and his responsibilities and authority remained identical in all respects to those he enjoyed prior to February 17."). Good further explained that legal requirements prevented any franchise conversions from starting until July 2004, more than three months after Anderson's resignation. *Id.*, Ex. B at TBA02070 ("Franchise sales have not started yet and have not even been marketed yet, because of legal requirements that were just completed on July 5[, 2004].").

v. Smith, 630 F. Supp. 262 (W.D.N.Y. 1986) (rejecting argument that position is not comparable "merely because it involve[s] less prestige"). The Committee further determined that Anderson's professional identity concerns were "unfounded." Judish Decl., Ex. A at A0168-69; *see also* A0214-15 (describing Sotheby's efforts to ensure that the SIR brand would not be "diluted" or "downgraded" under the Cendant model). The record contains substantial evidence to support these determinations.[3]

3. The Committee found that Cendant offered comparable compensation.

As Sotheby's has discussed, substantial evidence supports the Committee's finding that Cendant offered Anderson a position with comparable compensation. Defs.' Mem. 10-11. Anderson has not shown that this comparability finding was arbitrary and capricious.

Anderson argues that the Committee mistakenly "assumed that he would earn every cash and non-cash dollar in the [Cendant] proposal." Pl.'s Opp. 12. On the contrary, the Committee recognized that "neither Mr. Anderson nor Cendant could predict how much of these payments would be earned." Judish Decl., Ex. A at A0166. But the Committee noted, based on Anderson's compensation structure at Sotheby's, that Anderson was "obviously comfortable with earning a large percentage of his compensation based on bonuses and incentives." *Id.* The Committee further determined that "the amount of discretionary/optional compensation under the Cendant model . . . is reasonably achievable," and that "even if achieved at a partial level, the total compensation payable by Cendant would exceed that which could have been reasonably expected had the February 17 sale not occurred." *Id.*, Ex. A at A0167-68.

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[3] *See* Judish Decl., Ex. B at TBA02702 ("The Sotheby's business model was based on the existing Cendant models, but would be unique because of the high end listings and, because of Anderson's expertise in selling high end listings, [Good] anticipated that he would be involved in the same role."); *see also id.*, Ex. A at A0214-15 (describing negotiated terms in Cendant transaction "designed to protect the luxury nature of the Sotheby's International Realty brand").

Anderson criticizes the Committee for "arbitrarily" selecting December 31, 2005 as the "single point of compensation comparison." Pl.'s Opp. 14. This criticism is also without merit. The Committee's initial denial letter evaluates Cendant's compensation proposal at a number of points in time, and also compares the guaranteed and contingent elements of the Sotheby's and Cendant compensation models. *See* Judish Decl., Ex. A at A0165-68.

4. The Committee's determinations were not erroneous "as a matter of law".

As Sotheby's has discussed, Anderson's claim that the Committee's determinations are erroneous "as a matter of law" does not rest on any Second Circuit case law and the cases that Anderson cites are readily distinguishable. Defs.' Mem. 11-12. Anderson asserts that Sotheby's efforts to distinguish the decisions are "not persuasive," and he criticizes Sotheby's for not providing "helpful legal authority." Pl.'s Opp. 23. But it is Anderson who bears the burden of establishing that the Committee's determinations are legally erroneous. The weight of authority interpreting similar severance plans supports the Committee's conclusion. Defs.' Mem. 9-10.

5. The Committee complied with ERISA's procedural requirements.

As Sotheby's has discussed, the Committee complied with ERISA's procedural requirements. Defs.' Mem. 12-18. Anderson reasserts his earlier criticisms of the procedures followed by the Committee in resolving his benefit claim and administrative appeal, *see* Pl.'s Opp. 14-23; Pl.'s Mem. Supp. Mot. Summ. J. ("Pl.'s Mem.") 12-20, but these criticisms have no greater force the second time around.

a. The Committee's refusal to produce its interview notes did not prejudice Anderson.

Anderson again asserts that he was prejudiced by the Committee's "refusal" to provide written notes of the Committee's representatives' meetings with Siegel, Good, and Perez-Brau. Pl.'s Opp. 16-18. The Committee, however, provided Anderson with detailed descriptions of the statements made by Siegel, Good, and Perez-Brau, rather than the notes themselves, *see* Defs.' Mem. 13-14, because the Committee believed that the notes were protected by the work product doctrine. Magistrate Judge Eaton later determined that that the notes were not protected from disclosure. *See Anderson v. Sotheby's, Inc. Severance Plan*, 04 cv 8180 (SAS) (DFE), 2005 U.S. Dist. LEXIS 9033 (S.D.N.Y. May 13, 2005).

Anderson was not prejudiced by the fact that he was not given the notes themselves. As the First Circuit has stated, a participant must demonstrate a *connection* between a plan administrator's "failure to disclose the complete file" and the participant's "inability to receive from the plan administrator a full and fair review of [his] claim to benefits." *DiGregorio v. Hartford Comprehensive Employee Benefit Serv. Co.*, 423 F.3d 6, 16 (1st Cir. 2005). To demonstrate such a connection here, Anderson must establish that absent the withheld records "[he] did not understand the evidence that [he] had to provide to dispute [the Committee's] conclusion that [he] was not entitled to benefits." *Id.*

Anderson claims that without the meeting notes he "could not correct any errors in the record" or "point to any favorable evidence" supporting his claim. Pl.'s Opp. 18. The Committee, however, "took great care to ensure that each statement made by a Cendant employee on which it relied was spelled out in the initial denial letter, to allow Mr. Anderson or his representative to dispute these statements." *See* Judish Decl., Ex. A at A0191-92; *id.*, Ex. A at A0159-69 (initial denial letter); *id.*, Ex. A at A0199-217 (appeal denial letter). Anderson's administrative appeal largely failed to address or rebut the Committee's description of the Sotheby's and Cendant executives' statements. *Id.*, Ex. A at A0170-74 (appeal letter). As the Committee stated: "Very few of these statements were disputed by Mr. Anderson, and these disputes were specifically raised again with the Cendant representatives." *Id.*, Ex. A at A0192. In these circumstances, Anderson cannot now show "prejudice in a relevant sense" from his inability to review the written interview notes of the Committee's representatives. *DiGregorio*, 423 F.3d at 17.

b. The Committee considered all available evidence.

Anderson reasserts that the Committee failed to consider "all available evidence" submitted in support of his administrative appeal. Pl.'s Opp. 18-20. Anderson criticizes the Committee's failure to consider "the ongoing dispute between Sotheby's and Cendant over financial responsibility for payment of Anderson's severance" in assessing the credibility of Siegel, Good, and Perez-Brau. *Id.* at 18-19. He also points to the Committee's refusal to consider a prior benefit claim brought by George Ballantyne, another former Sotheby's employee. *Id.* at 19-20.

Anderson's assertions are again unavailing. The Committee found "no reason to question the credibility of the Cendant representatives." Judish Decl., Ex. A at A0216. The Committee also explained that Ballantyne "withdrew his claim for benefits under the Plan before [the Committee] began considering it." *Id.*, Ex. A at A0210. As a result, the Committee had not investigated the factual assertions raised in Ballantyne's claim letter. *Id.* The Committee was not required to reopen Ballantyne's withdrawn claim as part of its full and fair review of Anderson's benefit claim.

c. *Grossmuller* did not require the Committee to solicit Anderson's testimony.

Although Anderson never requested a personal appearance (despite being represented by the same counsel at all stages of the administrative process), he again claims that the Committee was required to solicit his in-person testimony. Pl.'s Opp. 21-22. Anderson bases his assertion on a misreading of *Grossmuller v. International Union*, 715 F.3d 854 (3d Cir. 1983).

In *Grossmuller*, a plan administrator terminated a participant's disability benefit based largely on the personal testimony of a private investigator hired by the administrator. *Id.* at 855. The administrator did not inform the participant of the investigator's evidence, and did not permit the participant "to examine that evidence or to submit written comments or rebuttal documentary evidence." *Id.* at 858. The administrator further "refused" the participant's request to personally testify. *Id*. As a result, the Third Circuit held that the administrator's refusal to consider the participant's personal testimony denied the participant a full and fair review. *Id*. Consistent with these facts, "*Grossmuller* extends only to the situation wherein a third party is permitted to appear at a meeting and provide information which the absent claimant cannot refute." *Skretvedt v. E.I. DuPont de Nemours & Co.* 268 F.3d 167, 176 (3d Cir. 2001) (internal quotation marks omitted); *see also Hlinka v. Bethlehem Steel Corp.*, 863 F.2d 279, 287 (3d Cir. 1988).

In contrast to *Grossmuller*, the Committee repeatedly informed Anderson of his right to submit factual evidence supporting his severance claim. *See* Judish Decl., Ex. A at A0039-40, A0175-76, A0193-95. The Committee's initial denial letter also provided Anderson with a detailed summary substance of the statements made by Siegel, Good, and Perez-Brau, enabling Anderson to refute this testimony in his subsequent submissions. *Id.*, Ex. A at A0159-69. Moreover, the Sotheby's and Cendant executives who met with the Committee did not advocate the denial of Anderson's claim. In this context, the Committee was not required to solicit Anderson's personal appearance. *See* Defs.' Mem. 16.

d. The Committee followed the Plan's written claim procedures.

Finally, Anderson repeats his assertion that the Committee did not follow the Plan's written claim procedures. Pl.'s Opp. 22-23. Anderson, however, fails to explain *how* the Committee failed to comply with the procedures set forth in the Plan's Summary Plan Description. Defs.' Local R. 56.1 Stmt. ¶ 9. The record reveals that the Committee acted consistently with the Plan's claim procedures at each step in the administrative process. Defs.' Mem. 17-18.

6. Anderson's citation to *Winkler* is improper.

Anderson cites the Second Circuit's recent unpublished summary order in *Winkler v. Metropolitan Life Ins. Co.*, No. 05-2447-cv, 2006 WL 509387 (2d Cir. Mar. 1, 2006), in faulting the Committee for "cherry-picking" unfavorable evidence from the record. *See* Pl.'s Opp. 3, 6, 14, 20. Anderson's citation to this order is improper. 2d Cir. R. § 0.23. "To the extent that defendants suggest this Court should rely on the Second Circuit's unpublished decision . . . [the] Court may not do so." *R.B. v. Bd. of Educ.*, 99 F. Supp. 2d 411, 418 n.7 (S.D.N.Y. 2000). In any event, *Winkler* simply states the truism that an ERISA plan administrator may not fail to "weigh the evidence" in making benefit determinations or ignore "significant evidence" contrary to the administrator's decision. 2006 WL 509387, at *1. Here, the Committee weighed the evidence in the record, and substantial evidence supports the Committee's decision.

7. Anderson is not entitled to a part-year bonus.

Anderson does not dispute that his prior Sotheby's compensation agreements calculated his annual bonus on the *end-of-year* profit for his regions. Pl.'s Opp. 22; *see also* Judish Decl., Ex. A at A0083-89. In support of his bonus claim, Anderson relies on *Reilly v. NatWest Markets Group*, 181 F.3d 253 (2d Cir. 1999), but his reliance on *Reilly* is misplaced.

In *Reilly*, the Second Circuit held that a percentage bonus based on *revenues* "falls comfortably within the definition of a 'commission' that is expressly included within the [New York] Labor Law's definition of 'wages'." *Id.* at 265. *Reilly* distinguished a companion New York Labor Law decision, *Dean Witter Reynolds, Inc. v. Ross*, 75 A.D.2d 373 (N.Y. Sup. Ct. 1980), which held that a bonus based on *profits* does not "become earned until the end of the production period . . . when all appropriate adjustments are made in conformity with the [bonus] plan." *Id.* at 381. In reaching this holding, the *Ross* court relied upon a New York Attorney General's opinion explaining that "[i]t is quite possible that the increased production attained in the first weeks of the [production] period might be offset by the decreased production occurring in the last week of such period and thus no incentive pay would be earned therein." *Id.* Anderson does not dispute that his Sotheby's employment terminated prior to the end of the calendar year, the relevant period for the profit-based formula upon which his past bonuses had been based. Pl.'s Opp. 24-25.

Anderson also fails to show why any bonus to which he might be entitled should not be calculated on the pro-rated financial projections for his regions. *See* Defs.' Mem. 18 n.17. Siegel, Anderson's direct superior at SIR prior to the Cendant transaction, stressed that the level of regional profits attained between January 1 and February 17, 2004 "would not have continued," and that Anderson "would have earned no more than prior years" had he remained employed by Sotheby's through the end of the year. Judish Decl., Ex. B at TBA02069. Anderson provides no evidence to counter Siegel's statements.

CONCLUSION

The Court should grant Defendants' motion for summary judgment, and should deny Anderson's motion for summary judgment.

Respectfully submitted,

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March 24, 2006

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of March, 2006, Defendants' Reply Memorandum in Support of Defendants' Motion for Summary Judgment was filed with the Clerk of Court using the CM/ECF system and thereby served on the following counsel of record for plaintiff:

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